20 TIPS FOR REPRESENTATIVES APPEARING BEFORE WCAT

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Representing participants before the Tribunal is demanding. Workers' compensation is a specialized area and a well prepared representative can help make the appeal process more efficient.

The purpose of this paper is to set out practical and easy to understand "tips" to help representatives appearing before the Tribunal.

Throughout, I have addressed my remarks to "you", the reader. I have assumed that the reader is a representative acting on behalf of a worker, an employer, or any other participant. My remarks also apply to those individuals who choose to present their own case. For convenience, 20 practice tips are divided into two general categories. Most pertain to oral hearings. A few additional suggestions concern appeals proceeding by way of written submissions. However, some tips are equally relevant to both forms of appeal.

Tips for Oral Hearings

1. *Addressing an Appeal Commissioner.* Addressing an Appeal Commissioner seems to be awkward for some representatives. It is perfectly acceptable for you to address an Appeal Commissioner as "Mr." or "Ms." and their surnames. If you prefer, you may address an appeal commissioner as "Mr./Ms. Appeal Commissioner" or "Mr./Ms. Commissioner".

2. *File documents right away.* All active participants are entitled to review and make submissions on relevant evidence. When additional evidence is received by an Appeal Commissioner at, or just prior to, a hearing, it usually results in a delay in the issuance of a decision pending notice to other participants. For this reason, if you intend to rely upon evidence at a hearing, you should file additional evidence well before the hearing and no later than the deadline set by the Tribunal.

3. *Raise preliminary matters before the hearing.* The appeal process is better served by raising difficult matters with the Tribunal in advance of a hearing. Preliminary matters can include, for example, objections to evidence, special hearing room requirements, security concerns and/or requests for adjournment. The Registrar of the Tribunal is available to deal with many preliminary matters. You should also consider the possibility of contacting other participants. Often, participants can work out a reasonable solution by discussing matters amongst themselves before a hearing.

4. *Bring copies of documents to the hearing.* If you have a document you wish to rely on at a hearing, bring copies of it to the hearing. Otherwise, the flow of the hearing may be interrupted. If the hearing is at a remote location, getting copies made can be inconvenient and time consuming.

5. *Review and know the entire Board file.* Quite often, relevant evidence is tucked away in various documents within a Board file. In most cases, medical reports will be important. However, don't overlook, for instance, notes, memos and records of telephone communications.

6. *Going beyond the issue dealt with by the Hearing Officer.* The Tribunal has limited jurisdiction in an appeal. You should clearly identify the issue(s) dealt with by the Hearing Officer and the initial adjudicator at the Board. If you want an Appeal Commissioner to go beyond the stated issue in the decision under appeal, be prepared to show, for example, that an additional issue was before the Hearing Officer.

7. *Prepare your witness.* It is stressful being placed under oath to answer questions before an adjudicator–but you can prepare your witness. Make sure the witness knows the time and location of the hearing. Advise him or her about parking. If you have more than one witness, tell them that there is a possibility they will be asked to wait outside the hearing room until they are called to testify. Your witness should know, at least in general terms, what you are going to ask. If your witness brings notes as a memory aid, be sure to enquire about them and lay a proper foundation for their use. Also, caution your witness that if he or she doesn't know the answer to a question while being examined, the witness cannot ask a spouse or other observer for information. Similarly, observers should be cautioned not to "help" a witness.

8. *Seating.* When asking a witness to be seated in a hearing room, there may be a designated witness chair. Otherwise, it helps to have your witness sit across from the Appeal Commissioner. A witness should not be so close to you that the witness will instinctively lower his/her voice. Everyone in the hearing room should be able to see and hear the witness.

9. *Make your questions relevant and get to the point.* WCAT hearings are informal. However, hearings should be efficient and to the point. It does not assist a participant to spend time on irrelevant matters. If, for example, the issue in an appeal concerns an impairment rating, don't dwell upon the worker's employment history and educational background.

10. *Do not lead a witness in direct examination about disputed facts.* Asking leading questions about critical factual matters in direct examination diminishes the impact of the witness' evidence. Leading questions in direct examination are of particular concern when there are no other participants present to cross examine a witness.

11. *Monitor your witness.* During your examination, it may be necessary to have your witness speak up. If your witness becomes emotionally upset or needs to pause due to physical discomfort, don't hesitate to request a brief recess.

12. *Go in order.* It is your task to present clear testimony. Unfortunately, some witnesses have trouble staying on track. Proceeding in a chronological sequence is generally a good way to take a witness through his or her evidence. It is also helpful to prepare an annotated timeline with important dates. Keep the timeline near at hand as an aid during the hearing.

13. *Anticipate findings to be made.* Your closing submissions provide an opportunity for you to summarize key aspects of the appeal. These may include significant reports and the legal tests to be considered by the Tribunal. You should state reasons why, for example, certain evidence should be preferred over other evidence. Your remarks will be more helpful if you are able to anticipate the findings the Appeal Commissioner must make and point to specific evidence supporting the findings you seek.

14. *Credibility.* One significant advantage of an oral hearing over written submissions is the opportunity to observe and assess the credibility of witnesses. Cues concerning credibility are easily overlooked in the middle of a hearing. Take the opportunity in your closing submissions to point out why a witness is or is not credible.

15. *Core principles.* In any area of the law, there are certain core principles that are well understood and need not be debated. Members of the Tribunal likely have a reasonable understanding of commonly cited provisions of the *Act* such as s. 187 (benefit of the doubt). Generally speaking, it is not necessary for you to do more than mention these in passing and move on. If highly technical or novel interpretations of well-known provisions are asserted and are important to an appeal, consider filing written pre-hearing submissions. You can refer to your written argument in your closing submissions.

16. *Sometimes less is more.* The most effective closing submissions I have observed dealt with only the more important aspects of an appeal. I recommend that you do not repeat small details or read long passages from expert reports. In your closing submissions, be mindful of the following seven points: speak slowly; speak clearly; use pauses; listen to yourself; be concise (but some repetition is okay); make eye contact with the decision-maker; and end by reiterating your strongest point.

Tips for Written Submissions

17. *State a specific issue.* The Tribunal requires that appellants file a Notice Of Appeal to initiate an appeal. In order to complete the Notice of Appeal form, an appellant is required to identify the issue(s) being appealed. An issue is a question the Tribunal must answer in order to resolve the appeal. The more clearly an issue is framed, the better. For example, an issue on appeal may be, "Whether the Worker's earnings loss after January 1, 200X is causally related to his compensable injury?" It is probably not, "Whether the Hearing Officer failed to properly weigh the evidence?"

18. *Discard boilerplate.* Written submissions must summarize the facts and procedural history of the appeal, set out the issue to be determined, discuss legal authorities, present legal argument and suggest an appropriate resolution for the appeal. Your submissions should be brief and to the point. Boilerplate submissions that say little or nothing about the particular issue(s) and facts in an appeal should be discarded. To avoid boilerplate, simply ask yourself whether the points made and the authorities cited in your submissions are directly relevant to the appeal.

19. *Decipher illegible reports.* The Tribunal deals with handwritten medical and other reports in almost every appeal. Some reports are quite difficult to decipher. If you want an illegible report to be considered, you should either decipher the report or ask the author of the report to do so.

20. *Documentary evidence.* Since there is no oral hearing when proceeding by written submissions, representatives may wish to file additional documentary evidence such as a statutory declaration, a photograph or a brief medical report. In some cases, evidence is available, but must be organized. This is particularly important when a large quantity of material has been submitted. Charts or summaries may assist in a review of the evidence.

Conclusion

The above practice tips are far from an all-inclusive listing. No doubt other suggestions can and will be added over time. It is hoped that these tips will be of some assistance to representatives appearing before the Tribunal.